

Baez v Stover
2021 NY Slip Op 30445(U)
February 10, 2021
Supreme Court, New York County
Docket Number: 153689/2013
Judge: Suzanne J. Adams
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SUZANNE J. ADAMS PART IAS MOTION 21

Justice

INDEX NO. 153689/2013

TOMAS BAEZ,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 008

- v -

ANTHONY STOVER, NEW YORK CITY TRANSIT
AUTHORITY, METROPOLITAN TRANSPORTATION
AUTHORITY,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 008) 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that defendants' motion for summary judgment and plaintiff's cross-motion for partial summary judgment are both denied. Triable issues of fact exist that preclude the granting of summary judgment on both liability and damages.

This is a personal injury action arising out of a motor vehicle incident which occurred on October 14, 2012, on Broadway at or near the intersection of 170th Street in Manhattan. Plaintiff alleges that his vehicle was hit in the rear by a bus operated by defendant Anthony Stover and owned by defendant New York City Transit Authority. Defendants now move pursuant to CPLR 3212 for summary judgment dismissing the action on the grounds that plaintiff's own negligence caused the occurrence, and that plaintiff's alleged injuries do not amount to a "serious injury" as defined in Insurance Law § 5102(d), New York's "No-Fault Law." Plaintiff opposes the motion,

and cross-moves pursuant to CPLR 3212 for summary judgment against defendants on the issue of liability. Defendants oppose the cross-motion.

It is well-settled that “the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986) (citing *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985)). The party opposing a motion for summary judgment is entitled to all reasonable inferences most favorable to it, and summary judgment will only be granted if there are no genuine, triable issues of fact. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 521-22 (1st Dep’t 1989). Additionally, the question of whether a plaintiff suffered a “serious injury” within the meaning of § 5102(d) of the No-Fault Law is one of law that can and should be disposed of by summary judgment. See *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002).

With respect to the issue of liability, the court notes – as do the parties – that the decision and order of this court dated July 15, 2014 (Hon. Michael D. Stallman), denied plaintiff’s initial motion for partial summary judgment on the grounds that the court could not determine from the bus surveillance video the color of the traffic signal before the time of impact, and whether plaintiff’s vehicle was stopped at the moment of impact. This court has also viewed the video and comes to the same conclusion. Moreover, the deposition testimony of both plaintiff and defendant Stover differ substantially in their description of the events leading to the impact, with plaintiff stating that he saw a yellow traffic light, slowed up, and come to a stop, and defendant stating that the light never changed to red and plaintiff stopped short at the yellow light. Whether the traffic light was yellow or red, whether defendant Stover was following plaintiff’s vehicle too closely, or whether plaintiff cut off the bus and then stopped abruptly before the light

changed, perhaps to pick up passengers, are all among significant factual questions for resolution by the trier thereof, not for this court to determine as a matter of law.

Likewise, summary judgment must be denied on the issue of damages because both parties present to the court conflicting evidence as to plaintiff's medical condition. For example, defendant proffers the report of Igor Rubinshteyn, M.D. (Exhibit H to the moving papers), which states that while plaintiff displayed some limitations in range of motion, he also displayed "voluntary suboptimal effort" on the range of motion testing, and concludes that plaintiff has only pre-existing degenerative conditions and is fully capable of returning to work without restrictions. Plaintiff, however, proffers, *inter alia*, the affirmation of Gabriel L. Dassa, D.O., dated October 8, 2020 (Exhibit F to the opposing papers), who states that he first examined plaintiff shortly after the subject incident and concludes that "due to ongoing symptoms, restrictions in range of motion, the fact that his medical history was noncontributory, MRI findings and my own clinical examination, that [plaintiff's] injury represents a significant limitation in the use of his right shoulder and a permanent partial disability." There also appears to be no significant discussion in the proffered medical reports of the effect on plaintiff's condition, if any, of prior and subsequent motor vehicle incidents. Thus, whether plaintiff has sustained a permanent consequential or significant limitation under § 5102(d), or anything else contemplated within the statute, proximately caused by the underlying incident, is a question of fact for the jury.

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is denied in its entirety; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the issue of liability is denied in its entirety.

This constitutes the decision and order of the court.

2/10/2021			
DATE		SUZANNE J. ADAMS, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE
	☒ DENIED		